

1969

L.A. Young Sons Construction Company v. State Tax Commission Of Utah : Reply Brief of Plaintiff

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IN THE SUPREME COURT of the STATE OF UTAH

L. A. YOUNG SONS CONSTRUCTION
COMPANY,

Plaintiff,

vs.

} Case No.
11467

STATE TAX COMMISSION OF
UTAH,

Defendant.

FILED

JUL 12 - 1968

REPLY BRIEF
OF PLAINTIFF

CLERK, Supreme Court, Utah

Writ of Review to Review an Order of
the State Tax Commission of Utah

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REPLY BRIEF OF PLAINTIFF

STATEMENT OF THE CASE AND FACTS

The Disposition of the Case Below, Nature of Relief Sought on Appeal, and Statement of Facts on which the Writ of Review rests (required by the terms of Rule 75 (p) (2), Utah Rules of Civil Procedure), for purposes of this Brief, are set forth in the main Brief of Plaintiff on file with the Court.

STATEMENT OF PURPOSE

The purpose of this Reply Brief is to respond to and answer the issue raised by the defendant in its answering

Brief as to the involvement of an auctioneer in the subject sale.

In its Statement of Facts, the defendant stresses that the subject sale was conducted by Forke Bros., an auctioneering firm. In its argument it also emphasizes that there was an auctioneer involved in the sale of this equipment and attempts to impute the business character of the auctioneering firm to Amis Construction Co., the seller. It attempts to persuade the Court that the equipment was sold by someone engaged in the business of equipment sales. It further attempts to persuade the court that a transaction handled by an auctioneer cannot be isolated or occasional under any circumstances. Such allegation and argument is contrary to the Stipulation of Facts entered into by the plaintiff with the defendant and also is contrary to the decision of the Tax Commission and should, therefore, be disregarded.

ARGUMENT

POINT 1

CONTRARY TO THE STATEMENT OF FACTS AND ARGUMENT OF POINTS IN DEFENDANT'S BRIEF, IT IS BOUND BY THE STIPULATION OF FACTS AND ITS DECISION WHICH HOLD THAT IT IS IRRELEVANT THAT THE SUBJECT SALE WAS CONDUCTED BY AN AUCTIONEER.

Paragraph 6 of the Stipulation of Facts entered into between the plaintiff and defendants states:

"... that in order to facilitate the sale of this equipment, Amis Construction Co. engaged the services of Forke Bros., an auctioneering firm of Lincoln, Nebraska. The equipment was sold at an auction and Forke Bros. was compensated for handling such sale on a commission basis, and at no time did Amis Construction Co. transfer title to or possession of any of the equipment to Forke Bros. The sale took place at the construction job site." (Stip. 6) (R 40)

The Stipulation of Facts further states in Paragraphs 8 and 9:

"Forke Bros. handled the sales of the used equipment in both the Topeka sale and in the Atlantic City, Wyoming, sale.

"Forke Bros. has been in the equipment auction business since 1921 and from 1921 to the present time Forke Bros. *has never purchased equipment for re-sale and has never sold any equipment for its own account. It is the business practice of Forke Bros. to act only as agents of and on behalf of the owners of the equipment who desire to sell it, and they acted only in that capacity in this sale.*" (Stip. 8, 9) (R41) (Emphasis added)

This Stipulation of Facts was entered into after extensive discovery and after an argument and Brief on this point had submitted to the Tax Commission. (R 9) (R 14)

At the time of the formal hearing of this matter before the defendant Tax Commission, the Sales and Use Tax Acts

and Regulations of 1965 were introduced into evidence and are a part of the record. (R 38) The Sales and Use Tax Acts and Regulations as of 1965 were in effect at the time that this transaction and sale occurred and are, therefore, the only regulations relevant to this case. Regulations S45 which was in effect at that time states as follows:

“S45. Auctioneers, consignees, bailees, etc. (Applies to sales and use taxes).-- Every auctioneer, consignee, bailee, factor, etc., entrusted with possession of any bill of lading, custom house permits, warehousemen's receipts, or other document of title for delivery of any tangible personal property, or *entrusted with possession of any of such personal property for the purposes of sales*, is deemed to be the retailer thereof, and upon the sale of such property is required to file a return on the selling price and pay a tax thereon. The same rule applies to lien holders such as storage men, pawnbrokers, mechanics, and artisans.” (Emphasis added)

After taking evidence and hearing argument, the Commission found in its Decision in paragraph 3 of its Findings of Fact that Forke Bros. auctioneering firm acted only as an agent of the seller. (R 57) In paragraph 4 of the Conclusions of Law found in its Decision, the Commission stated:

“that Forke Bros. acted only as agent for Amis Construction Co. at all times in this transaction *and, therefore, sales tax regulation section S45 is not applicable for this proceeding.*” (R 60) (Emphasis added)

The Commission has thus determined unequivocally that an auctioneer's involvement in this transaction is completely

irrelevant to the issues. However, after entering into the Stipulation of Facts and after finding this to be a fact in its Decision, Counsel for defendant in the Brief filed before this court now attempts to raise the same issue in complete disregard of the prior Stipulation of Facts, Finding of Fact, Conclusions of Law and Decision. The defendant quotes on page 5 of its Brief the 1967 Tax Commission regulation S38 which contains the same statement found in its regulation S45 in the 1965 regulations which it stated in its Decision was not applicable to this proceeding. On page 12 of Defendant's Brief it argues that this is a taxable transaction because "in the case at hand, the plaintiff, L. A. Young Sons Construction Company, and the auctioneer selling the property, Forke Bros., are both certainly regularly engaged in business." In the Stipulation of Facts and the Finding of Fact, the Tax Commission determined that Forke Bros. acted only as agent for Amis Construction Co. and the sale was between Amis Construction Co. and the plaintiff, not between Forke Bros. and the plaintiff. Counsel now wants to argue that the seller was Forke Bros., which is completely contrary to the facts as introduced to the Tax Commission. Parenthetically, it is, of course, irrelevant that the plaintiff was engaged in business that's not the issue in this case. The character of the purchaser is not relevant in determining whether or not a sale is isolated or occasional, but only the character of the seller, so the fact that L. A. Young Sons Construction Company is engaged in business, and at that not the business of buying or selling equipment, but the business of building roads, is irrelevant.

In the Conclusion to the Commission's Brief, the statement is found that the subject transaction was not an isolated or occasional sale because the auctioneer was regularly engaged in business. The auctioneer was not the seller, acted only as agent for the seller, and the Commission itself found the fact that there was an auctioneer involved in the transaction to be inapplicable and irrelevant to the issues of this case.

It is respectfully submitted that the defendant is irrevocably bound by the Stipulation of Facts and by its Decision and is precluded from arguing now that this was not an isolated or occasional sale because an auctioneer was engaged to facilitate the sale between Amis Construction Co. and the plaintiff. Even if this was a proper argument to make, which it isn't, such is not persuasive because this Court in *Geneva Steel Company v. State Tax Commission*, 116 Utah 170, 209 P. 2d 208, cited with approval a tax regulation of the State of Ohio as follows:

"Where a person sells his household furniture; where a farmer sells his farm machinery, or other farm equipment or where a grocer sells his cash register, counters, or other store *fixtures at auction or otherwise*, such persons are not 'engaged in the business' of selling tangible personal property at retail with respect to this property, but are making casual or isolated sales." (Emphasis added)

This Court then stated:

"The above regulations, as well as those of other states

which we have examined, definitely contemplate an isolated or occasional sale as one made by a person *while not in the pursuit of the regular course of his business of selling tangible personal property.*" (Emphasis added)

CONCLUSION

The defendant is precluded by the Stipulation of Facts and by its Decision from asserting that the sale involved was not isolated or occasional because of an auctioneer's involvement in the transaction. In any event, the argument has no merit.